

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 99-O-03**

DATE ISSUED: April 7, 1999

ISSUED TO: Murray Sagsveen, State Health Officer

CITIZEN'S REQUEST FOR OPINION

On February 16, 1999, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Arlie Knight asking whether the Fort Berthold Coalition Against Domestic Violence violated N.D.C.C. § 44-04-18 by failing to respond to his request for copies of minutes of all meetings of the Coalition's board of directors since January 1995 and for a copy of a recent audit of the Coalition's programs.

FACTS PRESENTED

In a letter dated January 29, 1999, Mr. Knight asked the Fort Berthold Coalition Against Domestic Violence (Coalition) for copies of the minutes of all meetings of the Coalition board of directors since January 1995. In a separate letter dated February 10, 1999, Mr. Knight asked the director of the Coalition for a copy of a recent audit of the Coalition's programs. The letter also describes several previous requests by Mr. Knight for a copy of the audit. Mr. Knight has not received the records he requested, and he has asked for this opinion. Apparently, the Coalition did not deny Mr. Knight's request in writing, but has simply not responded to his requests.

The Coalition is a North Dakota nonprofit corporation. It is not an arm of a tribal government or any agency or political subdivision of the State of North Dakota. The Coalition receives funds from the state and federal government under a number of different programs. These programs include: Federal Family Violence Prevention and Services (federal), Victim Assistance in Indian Country (federal), Stop Violence Against Women Program (STOP) (state and federal funds), Victims of Crime Act (VOCA) (state), Crime Victims Account (CVA) (state), and some state general funds. The Coalition is also a domestic violence organization under N.D.C.C. ch. 14-07.1 and receives grants from the state Domestic Violence Prevention Fund under N.D.C.C. § 14-07.1-16. With the exception of the VOCA grant from the Department of Corrections, the state funds received by the Coalition have come from the State Department of Health.

ISSUES

1. Whether the Fort Berthold Coalition Against Domestic Violence is a "public entity" subject to N.D.C.C. § 44-04-18, the state open records law.
2. If the Coalition is a "public entity" subject to N.D.C.C. § 44-04-18, whether the Coalition violated N.D.C.C. § 44-04-18 by not providing Mr. Knight with a copy of the audit and minutes he requested within a reasonable time.

ANALYSES

Issue One:

The North Dakota open records law, N.D.C.C. § 44-04-18, applies to "records" of a "public entity" as those terms are defined in N.D.C.C. § 44-04-17.1. As a non-governmental entity, there are four ways in which the Coalition may be a "public entity" subject to the open records law:

1. The organization is delegated authority by a governing body of a public entity. See N.D.C.C. § 44-04-17.1(6) (definition of "governing body").
2. The organization is created or recognized by state law, or by an action of a political subdivision, to exercise public authority or perform a governmental function. See N.D.C.C. § 44-04-17.1(12)(a) (definition of "public entity").
3. The organization is supported in whole or in part by public funds or is expending public funds. See N.D.C.C. § 44-04-17.1(9), (12)(c) (definitions of "organization or agency supported in whole or in part by public funds" and "public entity").
4. The organization is an agent or agency of a public entity performing a governmental function on behalf of a public entity or having possession or custody of records of the public entity. See N.D.C.C. § 44-04-17.1(12), (15) (definitions of "public entity" and "record").

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

State Health Officer

April 7, 1999

Page 3

As indicated in the FACTS PRESENTED portion of this opinion, the only link between the Coalition as a nonprofit corporation and an agency or political subdivision of the State of North Dakota is the Coalition's receipt of public funds from the State Department of Health and Department of Corrections. Upon review of these payments, no claim may be made that the Coalition is created or recognized by state law, is performing a governmental function on behalf of an agency or political subdivision of the state, is acting pursuant to authority delegated to the Coalition by a governing body of a public entity,¹ or is expending public funds. Thus, whether the Coalition is a "public entity" depends on whether the Coalition is "supported in whole or in part by public funds" as defined in N.D.C.C. § 44-04-17.1(9).

To begin, it is helpful to identify the "public funds" the Coalition has received. "'Public funds' means funds received from the state or any political subdivision of the state." N.D.C.C. § 44-04-17.1(13). This definition does not cover funds paid directly by the federal government to the coalition. 1998 N.D. Op. Att'y Gen. O-121, O-123. Thus, our review in this case is limited to the following programs under which the Coalition received funds directly from the State Department of Health or the Department of Corrections: Stop Violence Against Women Program (STOP), Victims of Crime Act (VOCA), Crime Victims Account (CVA), the Domestic Violence Prevention Fund, and some state general funds.

This office recently concluded:

[A]n organization receiving public funds under a contract with a state agency is not "supported in whole or in part by public funds," even if provided under a "Grant Agreement," as long as the goods or services provided in exchange for those funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds it receives.

1998 N.D. Op. Att'y Gen. 103, 105. In that opinion, the organization received public funds from a state agency on a reimbursement basis and was required to provide periodic program reports. Id. at 104.

In response to an inquiry from this office, the Coalition provided copies of contracts or budgets relating to most of the funds it

¹ Some of the funds are used to procure the services of a special prosecutor for domestic violence offenses, but the Coalition indicates that those services are provided in tribal court and are not provided on behalf of the State in North Dakota district court.

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

State Health Officer

April 7, 1999

Page 4

receives from the State Department of Health or the Department of Corrections. The state STOP funds are provided on a reimbursement basis. The VOCA and CVA grant applications include a detailed budget request indicating how the grant would be spent if approved. These documents identify the specific goods and services provided by the Coalition in exchange for the public funds it receives under those programs. The Coalition indicates that these funds reflect the fair market value of the goods or services it gives in exchange for the funds. One can assume this statement is correct or else the grant application would have been rejected. Accordingly, it is my opinion that these payments do not constitute support by public funds for purposes of the open records law.²

By contrast, the public funds the Coalition receives from the Domestic Violence Protection Fund under N.D.C.C. § 14-07.1-16, along with other state general funds it receives, are paid by the Department of Health without specifying any goods or services the Coalition is required to provide in exchange for those funds. Instead, the payments are for the general support of the Coalition's activities, and the Coalition has some discretion over the use of the funds. These subsidies are exactly the type of payment of public funds intended to be addressed by N.D.C.C. § 44-04-17.1(12)(c). Unless the public is allowed to have access to the records of the organization supported by the funds, there is no way for the public to know how its funds are being used. It is my opinion that the Coalition is "supported . . . by public funds" as a result of its receipt of these unrestricted payments, and is therefore a "public entity" for purposes of the open records law.

Issue Two:

As a "public entity," all of the Coalition's recorded information regarding its "public business" must be open to the public upon request unless otherwise specifically provided by law. N.D.C.C. § 44-04-18. In this context, the "public business" of the Coalition consists of all matters that relate or may foreseeably relate to how it spends the unrestricted public funds it receives from the State Department of Health. N.D.C.C. § 44-04-17.1(11)(b). There is an exception to the open records law for certain records of the Coalition regarding the location of a domestic violence shelter or the identity of clients receiving domestic violence services under N.D.C.C. ch. 14-07.1. N.D.C.C. § 14-07.1-18. Thus, except for the information protected from public disclosure under

² Copies of the contracts grant applications, and other related information referred to in this paragraph can be obtained from the State Department of Health or Department of Corrections.

N.D.C.C. § 14-07.1-18, all recorded information of the Coalition regarding its use of the unrestricted funds received from the Health Department must be open to the public.³ If those funds have been pooled with other revenue of the Coalition, and not segregated in a separate account, then all financial records of the Coalition must be open to the public. See 1998 N.D. Op. Att'y Gen. O-128, O-130 (payments for general support can be placed in context only by reviewing the organization's overall finances). This conclusion also applies to minutes of any meeting of the Coalition board of directors at which the Board discussed its use of the support it receives from the Health Department.

A public entity violates the open records law if it either denies a request for records that are required to be open or fails to grant a request for open records within a reasonable time. N.D.C.C. § 44-04-18(7). Here, Mr. Knight requested the minutes on January 29, 1999. He asked for the audit on several occasions, as noted in his February 10, 1999, letter. It is my opinion that the Coalition failed to provide to Mr. Knight within a reasonable time the minutes and audit regarding its use of the unrestricted funds received from the Department of Health and, therefore, violated N.D.C.C. § 44-04-18.

CONCLUSIONS

1. The Coalition is a "public entity" subject to the state open records and meetings laws to the extent its records or meetings pertain to the unrestricted funds it receives from the State Department of Health. If those funds have been pooled with other revenue of the Coalition, and not segregated in a separate account, then all financial records of the Coalition must be open to the public.
2. The Coalition violated N.D.C.C. § 44-04-18 by failing to grant Mr. Knight's request for records within a reasonable time.

STEPS NEEDED TO REMEDY VIOLATION

The Coalition must provide Mr. Knight, as open records, a copy of the audit report on the Coalition's programs and the portions of the

³ Similarly, all meetings of a governing body of the Coalition regarding its use of the public funds must be open unless otherwise specifically provided by law. N.D.C.C. § 44-04-19.

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION

State Health Officer

April 7, 1999

Page 6

minutes which relate to the Coalition's finances or use of the support it receives from the State Department of Health.

Failure by the organization supported by public funds to disclose a record as described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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